

**TENAGA NASIONAL BHD v. MAJLIS MESYUARAT KERAJAAN
NEGERI KELANTAN & ORS**

HIGH COURT MALAYA, KOTA BHARU
WAN AHMAD FARID WAN SALLEH J
[JUDICIAL REVIEW NO: DA-25-4-06-2019]
29 NOVEMBER 2020

ADMINISTRATIVE LAW: *Judicial review – Application to quash decision – Compensation by District Land Administrator under s. 16(1) of Electricity Supply Act 1990 ('ESA') – Amount revised by State Authority – Compensation amount revised again by way of consent order – Whether decision of State Authority could be challenged – Whether land owner aggrieved person – Whether State Authority entitled to review its previous decision – Whether consent order was attempt to review decision by State Authority – Whether decision of State Authority final – Whether consent order could be sustained*

The applicant is the nation's leading electricity supplier and a licensee under the Electricity Supply Act 1990 ('ESA'). In 2002, the applicant had commenced a wayleave procedure pursuant to s. 11 of the ESA, regarding certain portion of land in Bachok, Kelantan ('land'), now registered under the name of the fifth respondent for the applicant's project. At the time the procedure was commenced, the land was still registered under the name of one Sulaiman bin Awang Kechik ('Sulaiman'), the fifth respondent's uncle who had passed away. The fifth respondent only became the registered proprietor of the said land on 11 November 2007 by virtue of an order made pursuant to the Small Estates (Distribution) Act 1955 ('11 November 2007 Order'). A First Schedule notice under s. 11(2) of the ESA was issued by the applicant on 3 January 2002 and subsequently, an enquiry under s. 16(1) of the same Act was held by the fourth respondent, the Land Administrator of Bachok. At the enquiry, the fifth respondent was awarded RM2,120 as compensation for the loss of land use and crops in the affected portions of the land due to the applicant's wayleave procedure. Aggrieved, the fifth respondent lodged an appeal under s. 16(2) of the ESA on 17 March 2002 ('material time'). On 19 September 2007, the appeal was allowed by the State Authority ('first respondent'), and the compensation sum was increased from RM2,120 to RM40,000 ('first decision'). Dissatisfied, the applicant commenced a judicial review application at the High Court, seeking to challenge the first decision. The application resulted in the parties reaching a consensus, and, a consent order was recorded for the first respondent to rehear the fifth respondent's appeal on the compensation sum ('consent order'). Later, it was decided that the compensation sum to be at RM20,000 ('impugned decision'). Thus, the applicant's current action, seeking a judicial review, for an order of *certiorari* to quash the impugned decision.

A Held (dismissing application with no order as to costs):

- (1)** The fifth respondent is a person ‘aggrieved’ within the meaning of s. 16(2) of the ESA. He was entitled to lodge the appeal to the first respondent because: (i) when the notice in the First Schedule of the ESA was issued, Sulaiman had already passed away and, as a beneficiary of Sulaiman’s estate, he had the interest on the land; (ii) an aggrieved person only has 21 days to lodge an appeal to a State Authority and therefore, the fifth respondent had to act fast in order to protect and preserve Sulaiman’s estate. There was no time for an application for administration letters to be made. In any event, even if a beneficiary to a deceased’s estate is not clothed with administration letters, he still had an equity in such estate; and (iii) the fifth respondent was named as the one entitled to the compensation in respect of the portion of the land in the 11 November 2007 order. (paras 35-40)
- (2)** A State Authority’s decision in respect of an appeal against an assessment awarded by a District Land Administrator shall be final. The ESA does not give the State Authority any specific legal power to review its previous decision. A State Authority is *functus officio* with no power to make another or subsequent decision based on that previous decision and would commit an unlawful act if it does issue a second decision would, be against the principle of *res judicata* and would act without jurisdiction. Such a decision would be void and of no legal effect. Despite agreed by both parties, the consent order was an attempt by the first respondent to review the first decision, to circumvent the fact that it was already *functus officio* and to clothe itself with the purported authority to review its jurisdiction, which is not allowed by the ESA. Thus, the consent order could not be sustained and was a nullity and therefore, it could be disregarded. It followed that the impugned order by the first respondent to be equally null and void, resulting in the question to quash the impugned decision to not arise. The first decision remained enforceable. (paras 49-52, 54 & 55)

Case(s) referred to:

- Al Rashidy Kassim & Ors v. Rosman Roslan* [2007] 3 CLJ 361 FC (*refd*)
Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 CA (*refd*)
Eu Finance Bhd v. Lim Yoke Foo [1982] 1 LNS 21 FC (*refd*)
Ex p Sidebotham, re Sidebotham [1874-80] All ER Rep 588 (*refd*)
Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA (*refd*)
Lembaga Tatatertib Peguam-peguam v. Hoo Lin Coln & Anor [2008] 4 CLJ 317 FC (*refd*)
Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah Dan Galian, Selangor & Anor [2016] 5 CLJ 250 CA (*refd*)
Salak Land Development Sdn Bhd v. Pentadbir Tanah Kuala Langat & Ors [2015] 4 CLJ 506 CA (*refd*)
Tenaga Nasional Bhd v. Bandar Nusajaya Development Sdn Bhd [2016] 8 CLJ 163 FC (*refd*)
United Malayan Banking Corp Bhd v. Development & Commercial Bank Ltd Bhd [1983] 1 CLJ 82; [1983] CLJ (Rep) 421 FC (*refd*)

Legislation referred to:

Electricity Supply Act 1990, ss. 11(2), 16(1), (2), First Schedule

*For the applicant - Hadi Mukhlis Khairulmaini; M/s Steven Thiru & Sudhar Partnership
For the 1st, 2nd, 3rd & 4th respondents - Nik Habri Muhamad; State Legal Advisor,
Kelantan*

For the 5th respondent - Siti Amira Mohd Arifin; M/s Azhar & Fazuny

Reported by Syamim Ariffin

JUDGMENT

Wan Ahmad Farid Wan Salleh J:

Introduction

[1] The applicant is the nation's leading electricity supplier and a licensee under the Electricity Supply Act 1990 ("ESA"), an Act to provide for the regulation of the electricity supply industry.

[2] Sometime in 2002, the applicant had commenced a wayleave procedure pursuant to s. 11 of the ESA regarding certain portions of the lands in Bachok, Kelantan. Section 11 provides *inter alia* that whenever it is necessary so to do to install any system of distribution of electricity, the applicant as a licensee may, place or carry on, under or over any land, other than State land, such posts and other equipment as may be necessary or proper for the purposes of the licensed installation.

[3] The wayleave procedure was for the applicant's project for the construction of the 132kV electricity supply line from PMU Panchor to PMU Kandis Bachok.

[4] One of the lands affected by the said exercise was known as GM 1991, Lot 2113, Mukim Gajah Mati, Bachok ("the said land"). The fifth respondent, Mohd Shaari bin Noor, is the registered owner of the said land.

[5] On 3 January 2002, the applicant had issued a First Schedule notice under s. 11(2) of the ESA to one Sulaiman bin Awang Kechik ("Sulaiman"). Sulaiman, who passed away on 16 March 2001, was the then registered owner of the said land and the uncle to the fifth respondent. Section 11(2) *inter alia* provides that the notice must state as fully and accurately as possible the nature and extent of the acts intended to be done by the plaintiff. Paragraph 1(a) of the notice states as follows:

(a) Membersih dan memelihara kebersihan suatu rentis selebar lebih kurang 2 RANTAI. Jika ada pokok-pokok dalam kawasan tersebut ianya akan ditebang dan bangunan-bangunan di situ yang mana difikirkan membahayakan perlu dipindahkan. Rentis yang dicadangkan itu telah diukur dan ditunjukkan dengan warna merah di dalam pelan berkembar bersama ini di mana ianya melintasi lot-lot tersebut di atas seluas lebih kurang 0.067 EKAR.

- A [6] Subsequently, an enquiry was held by the fourth respondent, the Land Administrator, Bachok, under s. 16(1) of the ESA. Section 16(1) provides that the amount of compensation payable under s. 11 shall be assessed by the Land Administrator after such enquiry as he shall deem sufficient.
- B [7] At the enquiry, the fourth respondent had awarded a compensation payment of RM2,120 regarding the portion of the said land measured at 0.067 acres.
- [8] Aggrieved by the said award, the fifth respondent had lodged an appeal under s. 16(2) of the ESA on 17 March 2002.
- C [9] On 19 September 2007, the first respondent had allowed the fifth respondent's appeal and ordered that the compensation sum for the loss of land use and the crops on the portion of the said land be increased to RM40,000. The first respondent's order was communicated to the applicant through the fourth respondent's letter dated 30 December 2007.
- D [10] Dissatisfied with the said decision of the first respondent, the applicant filed an application for judicial review in this court *vide* Judicial Review Application No. 25-9-2008 ("JR No. 9"). There were 55 other similar judicial review applications to challenge the increase in the compensation.
- E [11] When the matter came up for hearing on 18 May 2010, the parties therein had reached a consensus for the appeal to be heard again by the first respondent. Paragraph 1 of the consent order states as follows:
- [1] Kes ini didengar semula oleh Majlis Mesyuarat Kerajaan Negeri Kelantan.
- F Although the consent order was recorded in this court on 18 May 2010, it was only prepared and finalised sometime in December 2018.
- [12] Pursuant to the said consent order and in particular the remaining terms thereof, the applicant submitted its representation dated 10 December 2018 to the first respondent for its further deliberation. Paragraph 3 of the
- G said letter states as follows:
- [3] Kami telah diarahkan oleh anakguam kami untuk menyediakan representasi ini kepada pejabat Tuan/Puan, untuk dipertimbangkan oleh Majlis Mesyuarat Kerajaan Negeri Kelantan dan menentukan semula Rayuan di bawah s. 16(2) ABE 1990 ini, agar keputusan Pentadbir Tanah
- H Daerah Bachok bertarikh 9.10.2002 tersebut dikekalkan.
- [13] The applicant was then informed by the State Legal Advisor's office that the first defendant had re-determined the fifth respondent's appeal under s. 16(2) of the ESA and according to the consent order dated 18 May 2010.
- I [14] The amount of compensation to the fifth respondent was then re-determined for the sum of RM20,000 ("the impugned decision").

[15] In a letter dated 25 March 2019, the applicant was informed by the State Legal Advisor as follows: A

Untuk makluman pihak tuan, pihak kamar ini telah menerima makluman akan keputusan Pihak Berkuasa Negeri melalui Kertas MMKN bil. 04/2019/D 17(119) yang disahkan pada 13/2/2019 yang memutuskan secara muktamad sejumlah pampasan RM20,000.00 sebagai pampasan Hak Izin Lalu (Wayleave) untuk dibayar oleh Pemohon, Tenaga Nasional Berhad, kepada Responden Kelima. B

[16] In this application for judicial review, the applicant seeks *inter alia* for an order of *certiorari* to quash the impugned decision.

The Respondents' Response C

[17] The first to fourth respondents have filed an affidavit-in-reply ("AIR") in encl. 11 through Zamri bin Ismail ("Zamri"). Zamri is the Director of Land and Mines, Kelantan.

[18] In the AIR, Zamri said that pursuant to the consent order dated 18 May 2010, he had prepared a paper for the deliberation of the first respondent ("Exco paper"). The Exco paper which Zamri prepared contained representations by both the applicant and the fifth respondent. D

[19] In para. 7 of the AIR, Zamri said that in the course of the deliberation, the first respondent is not bound by any valuation report, neither the first respondent is bound by the decision on the compensation made by the fourth respondent. According to Zamri, the compensation of RM20,000 was awarded after considering both representations. In any event, the amount awarded is reasonable. E

[20] In the meantime, the fifth respondent has filed a separate affidavit-in-reply ("AIR-D5") in encl. 9. According to the fifth respondent, the area required for the wayleave was 0.067 acres (2,918.52 square feet). However, in view of the whole of the said land is measured by 0.0424 hectares (4,563.89 square foot), the remaining portion of the said land is too negligible to be developed as an agricultural concern or be converted to the "building category". F G

[21] In short, according to the fifth respondent, the wayleave exercise is as good as taking over the whole of the said land. In any event, the remaining portion of the said land is exactly under the 132kV electricity supply line, making it impossible for the fifth respondent to enjoy in view of the risk involved. H

[22] Therefore, it is the position of the fifth defendant that the decision of the first respondent made under s. 16(2) of the ESA was reasonable within the context of the *Wednesbury* principle. I

- A [23] This is so because the decision made under s. 16(2) of the ESA took into account all relevant matters including the valuation report of Messrs Nasir Sabaruddin & Associates dated 14 May 2009 in exh. SBN-5.

The Submissions

- B [24] In essence, learned counsel for the applicant submitted that the impugned should be quashed on the following grounds:

- (i) There was an error of law or otherwise jurisdiction on the part of the first respondent for its failure to provide any reasons for the impugned decision.
- C (ii) There was a further error of law or otherwise jurisdiction on the part of the first respondent when it purported to determine the fifth respondent's appeal when at the material time, the fifth respondent was not the registered owner of the said land.
- D (iii) The first respondent also committed an error of law when it purported to increase the compensation to RM20,000, which is approximately 843% from the original order of the fourth respondent who awarded the sum of RM2,120.

- E [25] There is another further issue in the applicant's submission. It is this. Learned counsel argued the AIR was not filed by the representative of the first or second respondent. In the circumstances, whatever that was affirmed by Zamri, who is not the decision-maker, is hearsay in nature and, therefore, according to learned counsel, inadmissible (see *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* [1997] 2 CLJ 248; [1997] 2 MLJ 17 (CA)).
- F Since the applicant's contention against the impugned decision stands un rebutted, learned counsel submitted that the application to quash the impugned decision should be allowed.

- G [26] On the failure to provide any reason in respect of the impugned decision, learned counsel for the applicant submitted that such a failure would allow this court to conclude that the first respondent had no good reason in arriving at the impugned decision (see *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; [1996] 1 MLJ 481 (CA)).

- H [27] My attention was then drawn to another Court of Appeal case of *Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah Dan Galian, Selangor & Anor* [2016] 5 CLJ 250 CA. In that case, the Selangor State Authority ("SA") had approved the appellant's application to alienate a 70-acre plot of State land to carry out a development, which was later revoked. By way of an application for judicial review at the High Court, the appellant sought to quash the decision on the grounds *inter alia* that the respondents had, acted illegally, irrationally, in excess of jurisdiction and unreasonably and that the
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failure to give any reason for the revocation was absurd and illogical. The High Court found that there was no merit in fact or in law to justify the court in quashing the respondent's decision to cancel the alienation of the State land.

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[28] As it turned out, the said land had been alienated to some other party. No reason was given for the revocation.

B

[29] On appeal to the Court of Appeal, although the SA is vested with the power that included the power to revoke the order of alienation made, the law dictates that reasons ought to have been given to the appellant. As there was no reason given, when in fact and law, it ought to be given by the SA, that decision was therefore, bad. The Court of Appeal then issued the order of *certiorari* and quashed the said decision of the SA in revoking the alienation order in favour of the appellant.

C

[30] On the aforesaid authorities, learned counsel for the applicant then submitted that it is imperative for the first respondent to provide reasons for its decision to exponentially increase the compensation to be paid by the applicant.

D

[31] On the *locus standi* of the fifth respondent to lodge the appeal under s. 16(2) of the ESA, learned counsel submitted at the time the appeal was lodged, which was on 21 October 2002, the fifth respondent was not even the registered proprietor of the said land. It is not in dispute that the fifth respondent became the registered owner of the said land on 11 November 2007.

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[32] Learned counsel for the applicant submitted that the owner or occupier could only make an appeal under s. 16(2) of the ESA of the affected land.

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[33] Under the circumstances, it is the submission of learned counsel for the applicant that the appeal under s. 16(2) was not properly brought to the first respondent.

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[34] Finally, on the issue of exorbitant compensation. On this ground, learned counsel for the applicant submitted that:

(i) The first respondent had failed to take into consideration that the fourth respondent's award of compensation was properly arrived at upon a proper enquiry.

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(ii) Citing the Federal Court case of *Tenaga Nasional Bhd v. Bandar Nusajaya Development Sdn Bhd* [2016] 8 CLJ 163; [2017] 1 MLJ 689 (FC), learned counsel for the applicant submitted that the first respondent must necessarily give due consideration to the fourth respondent's findings in determining whether the award should be maintained or otherwise.

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- A (iii) Secondly, learned counsel submitted that was no basis to justify the award of RM20,000. In any event, it is the contention of learned counsel for the applicant that the compensation envisaged s. 16 of the ESA should be assessed and determined based on the loss of use of the affected land and not the market value of the land (see *Salak Land Development Sdn Bhd v. Pentadbir Tanah Kuala Langat & Ors* [2015] 4 CLJ 506; [2015] 3 MLJ 487 (CA)).
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Analysis

- C [35] I will first deal with the issue as to whether the fifth respondent has the *locus standi* to appeal to the first respondent under s. 16(2) of the ESA. It is pertinent to note that s. 16(2) employs the phrase “any person aggrieved”. Who then is “any person aggrieved”? The Federal Court in *United Malayan Banking Corp Bhd v. Development & Commercial Bank Ltd Bhd* [1983] 1 CLJ 82; [1983] CLJ (Rep) 421; [1983] 1 MLJ 165 (FC) stated that aggrieved “connotes some legal grievance, for example, a deprivation of something, an adverse effect on the title to something”.
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- E [36] Again, the Federal Court in *Lembaga Tatatertib Peguam-peguam v. Hoo Lin Coln & Anor* [2008] 4 CLJ 317; [2008] 4 MLJ 1 (FC) cited the judgment of James LJ in the English Court of Appeal case of *Ex p Sidebotham, re Sidebotham* [1874-80] All ER Rep 588 (CA):

A ‘person aggrieved’ must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.

- F [37] Applying the law to the instant case, it is to be recalled that when the notice in the First Schedule of the ESA was issued, Sulaiman had already passed away. I do not think that it is in dispute that the fifth respondent, as a beneficiary to the estate of Sulaiman, has an interest in the said land.

- G [38] One has to bear in mind that under s. 16(2) of the ESA, an aggrieved person has 21 days to appeal to the State Authority. The fifth respondent has to act fast in order to protect and preserve the estate of Sulaiman. There is no time to make the application for the letters of administration. In the case of *AlRashidy Kassim & Ors v. Rosman Roslan* [2007] 3 CLJ 361 (FC), the Federal Court held that even if a beneficiary of an estate is not clothed with the letters of administration, he has at least an equity in the estate of the deceased. In delivering the judgment of the court, Arifin Zakaria FCJ (as the former CJ then was) made the following observation:
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- I Thus, the appellants have had to act fast in order to protect and preserve the estate of the deceased. Therefore, on the facts of this case, we find, there exist special circumstances for the beneficiaries to commence legal action against the respondent *qua* beneficiaries for the purpose of protecting and preserving the asset of the estate.

[39] In any event, by virtue of an order dated 11 November 2007 made under the Small Estates (Distribution) Act 1955, the fifth respondent was named as the one entitled to the compensation in respect of the portion of the said land.

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[40] It is, therefore, my finding that that the fifth respondent is a person aggrieved within the meaning of s. 16(2) of the ESA and therefore is entitled to lodge the appeal to the State Authority.

B

Findings

[41] First, I have to put things into perspective. The question that arises is, what is the status of this consent order? Can this consent order clothe the first respondent with the necessary jurisdiction to make a second deliberation and eventually issue a second order in the form of the impugned order?

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[42] In *Bandar Nusajaya Development (supra)*, the appellant, Tenaga Nasional Bhd, had proposed a project which entailed entering into the parcels of land belonging to the respondent to erect transmission towers and leading cables. The district land administrator assessed the compensation at RM11,426,555.70 to be paid by the appellant to the respondent (“the award”).

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[43] Aggrieved by the award, the respondent appealed to the State Authority. The appeal was allowed, and the award was increased to RM34,522,099 (“the first decision”). The appellant wrote to the Menteri Besar asking for a revision of the same.

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[44] The State Authority acceded to the appellant’s request and the award made in the first decision was revised; reverting to the award of RM11.4m but increased by 30% (“the second decision”).

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[45] The appellant paid the sum awarded in the second decision to the respondent. However, a few years later, the appellant was notified that it had to pay the respondent the sum awarded in the first decision.

[46] The appellant objected to the notification to pay and informed the district land administrator that the second decision had superseded the first decision. The state authority then set aside the second decision and concluded that the first decision was final (“the third decision”).

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[47] The appellant then filed an application for judicial review to quash the third decision. The High Court granted an order of *certiorari* quashing the third decision and upheld the second decision. The respondent appealed to the Court of Appeal against the decision of the High Court Judge, and the respondent’s appeal was allowed. The first and third decisions were upheld.

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[48] Dissatisfied, Tenaga Nasional Bhd appealed to the Federal Court.

[49] In dismissing the appeal from Tenaga Nasional Bhd, the Federal Court held that by virtue of s. 16(2) of the ESA, the State Authority’s decision in respect of an appeal against an assessment awarded by the district land

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A administrator shall be final. In determining an appeal under s. 16(2), the State Authority had acted in quasi-judicial function and discharged its function under the provision when it issued the first decision.

B [50] The Federal Court further held that ESA does not give the State Authority any specific legal power to review its previous decision. The State Authority was, in fact, *functus officio* with no power to make another or subsequent decision on the award of compensation. Therefore, the State Authority had committed an unlawful act when it issued the second decision. The issuance of the second decision would then be against the principle of *res judicata*. When the second decision was issued, the State Authority had acted without jurisdiction. Such a decision was void and of no legal effect.

C [51] The main issue before this court, in my opinion, is this. The consent order is, in effect, an attempt for the first respondent to review the first order on the compensation made by the first respondent. In my considered opinion, the consent order, despite being agreed by the parties herein, is an attempt to circumvent the fact that the first respondent was already *functus officio*. It is an attempt to clothe the first respondent with the purported authority to review its jurisdiction, which according to the Federal Court in *Bandar Nusajaya Development*, is not allowed by ESA.

D [52] To my mind, the consent order could not be sustained since it went against the principle of *res judicata* as reminded to us by the Federal Court.

E [53] I am fully aware that the parties have not canvassed this issue, but I am bound by the principle of *stare decisis* in view of *Bandar Nusajaya Development*.

F [54] It is, therefore, my finding that the consent order is a nullity and therefore has no legal effect. What then is the attendant consequence of an order that is null and void? In *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37 FC, Abdoollcader J (later SCJ) made the following remarks:

G The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind to be non-existent.

H [55] Since the first respondent could not by any account review its own decision under s. 16(2) of the ESA, the first decision remains enforceable until and unless it is quashed.

I [56] My decision will therefore be as follows:

- (i) Once the State Authority has made an order under s. 16(2) of the ESA, it cannot review its own decision since ESA does not allow it to do so.

- (ii) Having made the decision, the State Authority will become *functus officio*. A
- (iii) To allow the State Authority to review its own decision would go against the principle of *res judicata*.
- (iv) The consent order, notwithstanding the fact that it was made by consent from the parties, does not confer the jurisdiction to the State Authority, in this case, the first respondent, to review its own decision since it flies in the face of the specific provision of ESA. B
- (v) In the circumstances, the consent order is a nullity and on the authority of *Eu Finance (supra)*, can therefore be disregarded. C
- (vi) In view of my finding that the consent order is a nullity, the impugned order by the first respondent is equally null and void.
- (vii) The question of quashing the impugned order does not therefore arise.
- [57]** The application for judicial review is dismissed with no order as to costs. D

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